Supreme Court, U.S.
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UNITED STATES SUPREME COURT

Case No.

MAHFOUZ EL SHAHAWY, M.D. and MAHFOUZ EL SHAHAWY, M.D., P.A.,

Petitioners,

v.

WILLIAM T. HARRISON, JR., etc., et al.

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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June 15, 1995

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QUESTIONS PRESENTED FOR REVIEW

Whether the Eleventh Circuit Unduly Deferred to the District Court's Refusal to Vacate An Arbitration Award Where the Arbitrators Indisputably Were Guilty of Misconduct in Refusing to Hear Evidence Pertinent and Material to the Controversy

PARTIES

Plaintiffs:

Mahfouz El Shahawy, M.D., and his professional association, Mahfouz El Shahawy, M.D., P.A.

Defendants:

David Bowman
John N. Carlson, M.D.
John Chidsey, M.D.
Patrick R. Delmastro, M.D.
Bruce Fleegler, M.D.
H. J. Floyd
C. Ted French
William T. Harrison, Jr.
Ponnuswamy Natarajan, M.D.
Charles Mathews, M.D.
Lamar Mathews
Gene E. Myers, M.D.
William L. Page, M.D.
F. Edwards Rushton, M.D.
Sarasota County Public Hospital Board
Richard J. Sarkis, M.D.
Marc Silverstein, M.D.
David J. Stutz, M.D.

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DECISION BELOW

The Court of Appeals affirmed without opinion: *Shahawy v. Harrison*, 51 F.3d 1049 (11th Cir. 1995). Prior published opinions include: *Shahawy v. Harrison*, 875 F.2d 1529 (11th Cir. 1989); *Shahawy v. Harrison*, 790 F.2d 75 (11th Cir. 1986).

GROUNDS FOR JURISDICTION

The Eleventh Circuit entered its decision on March 20, 1995: *Shahawy v. Harrison*, 51 F.3d 1049 (11th Cir. 1995). This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

STATUTE INVOLVED

9 U.S.C. § 10

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration -

(1) Where the award was procured by corruption, fraud, or undue means.

(2) Where there was evident partiality or corruption in the arbitrators, or either of them.

(3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(5) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

(b) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.

STATEMENT OF THE CASE

Plaintiffs, Mahfouz El Shahawy, M.D., and his professional association, seek this Court's review of the Court of Appeal's per curiam affirmance of an order of the district court denying their Petition, pursuant to 9 U.S.C. § 10 and other applicable law, to vacate an arbitration award in favor of the Defendants on their claims for violation of the Sherman Act.

Dr. Shahawy sought privileges at the catheterization laboratory at Sarasota Memorial Hospital, a public hospital in Sarasota, Florida, from 1978 through 1983. In November 1982, he sued in the district court for antitrust, civil rights, racketeering, and state common law violations. The Hospital Board denied him catheterization privileges in 1983. The district court then dismissed his suit. Two weeks later, the Board dismissed Dr. Shahawy from the medical staff, primarily on the ground that his efforts to gain catheterization privileges were "disruptive."

This Court reversed the district court's dismissal of Dr. Shahawy's antitrust claims. *Shahawy v. Harrison*, 790 F.2d 75 (11th Cir. 1985). Dr. Shahawy amended his complaint to include the termination of his staff membership. The district court entered summary judgment for the Defendants on the antitrust claims. Dr. Shahawy appealed, and this Court again reversed. *Shahawy v. Harrison*, 875 F.2d 1529 (11th Cir. 1989).

In 1991, the parties entered an Arbitration Agreement. A mediator retained the services of three former federal judges to serve as Arbitrators.

The evidence proved overwhelmingly that the Defendants excluded Dr. Shahawy by illegal means and for anticompetitive purposes. Defendants showed *nothing* to rebut Dr. Shahawy's prima facie case. Defendants indisputably combined to exclude Dr. Shahawy, first from the cardiac catheterization laboratory and then from the medical staff itself.

Dr. Shahawy obtained a medical degree from the University of Vienna (first in his class and *summa cum laude*) and a Master of Science degree from the Mayo Clinic. He spent over four years on the faculties of the Medical College of Georgia and the University of Florida. Throughout his brilliant, twelve-year academic career, Dr. Shahawy studied, performed, researched, and published extensively in invasive cardiology.

Dr. Shahawy moved to Sarasota in 1975 and was admitted to the staff at Memorial Hospital. Memorial Hospital was (and is) one of the state's largest, and presented great opportunities. There were then no invasive cardiologists in Sarasota, no catheterization laboratory, and no cardiovascular surgery. Dr. Shahawy helped to obtain a feasibility study for a catheterization laboratory, and a laboratory opened in March, 1978.

A medical staff committee persuaded the Hospital Board to limit the laboratory initially to two doctors (Defendants Natarajan and Myers). Dr. Shahawy submitted his application for catheterization laboratory privileges three months after the lab opened. A committee said that Dr. Shahawy was qualified, but that interpreted the Board's decision to limit the number of doctors doing catheterizations "initially" to require them to wait until the lab had been opened for one full year before admitting any more doctors.

Meanwhile, a Dr. Robert Graybeal joined Dr. Shahawy's practice and applied for catheterization privileges. Resistance to Dr. Graybeal's application led to the appointment of a "red ribbon" committee which ultimately struck down the numerical restriction. A medical staff member involved in the study warned, *"the great danger is that such discrimination may be the spark that lights the witch-hunt fire beneath all of us brought on by those who wish to establish and maintain a monopolistic empire for themselves."*

In December, 1979, the Hospital Board adopted criteria for catheterization privileges, -- (1) certification by the American Board Of Internal Medicine in cardiovascular disease, with two-year catheterization training and maintenance of proficiency; or (2) "special consideration" for "unusually qualified persons." Dr. Shahawy re-submitted his application under criterion "D" for "unusually qualified persons." Dr. Shahawy's application had to

traverse a hierarchy of five committees. The American Medical Association Principles of Ethics, specifically adopted in the medical staff Bylaws, called for an opportunity to be present "whenever physicians sit in judgment on physicians and whenever that judgment affects a physician's reputation, professional status, or livelihood." Defendants denied Dr. Shahawy this right.

After conflicting conclusions, the Chairman of the Medical Staff Credentials Committee appointed an ad hoc committee, which returned with a formal report in favor of Dr. Shahawy's application. The Staff Credentials Committee therefore found Dr. Shahawy "competent and well trained" and "recommended that Dr. Shahawy be granted privileges in the cath lab contingent upon his completing a refresher course in catheterization with accompanying certification from his mentor that he is unusually well qualified to perform cardiac catheterizations." The Executive Committee accepted this recommendation on May 19, 1980, adding only the requirement that the course be "acceptable to Credentials Committee." Dr. Shahawy refreshed his skills in Indianapolis, at one of the busiest laboratories and under one of the leading catheterization physicians in the world, Dr. William Nasser. Dr. Nasser certified that Dr. Shahawy completed the course and was "unusually qualified." The Chairman of the Medical Staff Credentials Committee wrote to the hospital administrator and the Chief of Staff that Dr. Shahawy had satisfied the Credentials Committee and should be granted

catheterization privileges. The administrator scheduled the recommendation for the Board's next meeting.

On Friday morning, June 6, the Chief of Staff convened a closed "special meeting" of the Executive Committee. A motion to remove the favorable recommendation from the Board's agenda passed seven-to-six. A further motion passed, which directed the lower committees to meet before the Executive Committee met again. The meeting the Executive Committee ordered never occurred. Instead, the Chief of Staff called yet another "emergency" meeting of the Executive Committee, on Sunday night, June 8. The committee voted to deny Dr. Shahawy's application.

Dr. Shahawy appealed to the same Executive Committee which denied his application. The Medical Staff By-Laws provide a hearing procedure on any adverse recommendation on privileges. The physician first receives a hearing before the Executive Committee. If the Executive Committee votes to sustain its own recommendation, the physician receives a hearing before the Board. The By-Laws impose a heavy burden on the appealing physician at both hearings:

> It shall be the obligation of such representative to present appropriate evidence in support of the adverse recommendation or decision but the affected physician or dentist shall thereafter be responsible for

> supporting his challenge to the adverse recommendation or decision by an appropriate showing that the charges or grounds involved lack any factual basis or that such basis or any action based thereon is either *arbitrary, unreasonable or capricious*.

Yet Defendants took the anomalous position that these were "de novo hearings," and that they could therefore present new evidence never considered by any prior committee.

At the Executive Committee hearing, Dr. Shahawy was subjected to a surprise, multi-level hearsay fusillade that was intended to be impossible to rebut. One doctor claimed that a former student of Dr. Shahawy's, a Dr. Gary Cooper, had told him over the telephone that in January, 1974, Dr. Shahawy "did three to four caths, had two near deaths, [and] two brachial arteries had to be tied off." This was false, as the cath lab reports would later prove. The Executive Committee voted nine-to-four to deny Dr. Shahawy's application again.

Dr. Shahawy appealed to the Hospital Board. At the Board hearing (in October, 1980), Dr. Cooper testified only that Dr. Shahawy had "some problems at the catheterization lab." On the second night, Dr. Shahawy presented professors of cardiology who refuted Dr. Cooper's charges. The Board in its deliberations opined that Dr. Shahawy was qualified to do

catheterizations, and expressed strong opinions that the witnesses against him were biased. One Board member, however, moved to deny Dr. Shahawy's application because he was upset that Dr. Shahawy was referring his own catheterizations to Tampa. The Board voted six-to-one to deny the application.

Dr. Shahawy passed the examination for American Board certification in cardiovascular disease at the next opportunity, and resubmitted his application. The Defendants, however, insisted on treating Dr. Shahawy's submission as an entirely new application, and forced Dr. Shahawy to run the same gauntlet of lower committees. The Hospital Board's attorney, Defendant Harrison, attended the committee meetings.

The Cath Lab Standards Committee demanded "photostat copies of *all* the cardiac cath reports of patients that you personally studied by cardiac cath and angiography since the inception of your training." Dr. Shahawy, whose training had begun twenty years before this at the University of Vienna (and had continued beginning in 1968 at the Mayo Clinic and in 1971 at the Medical College of Georgia) responded that he did not keep such documentation, and told them they were welcome to obtain his records from those institutions. The committee met again and wrote that "the applicant has refused to submit data for evaluation." In lieu of the catheterization reports, to which he did not have access, Dr. Shahawy submitted depositions (taken in the then-pending

libel suit against Dr. Cooper, which resulted in Dr. Cooper retracting and apologizing for his defamatory statements) of his superiors at the University of Florida who had reviewed and testified about the catheterization reports from that institution. Their testimony showed that the procedures had been performed with no complications while Dr. Shahawy was Director of the Catheterization Laboratory at Shands Teaching Hospital at the University of Florida.

The committee convened to deny Dr. Shahawy's application on June 10, 1982. Defendant Harrison, the Hospital attorney, composed a five-page self-styled "report" recommending denial of Dr. Shahawy's application. When the application reached the Executive Committee, Dr. Shahawy testified that he could now produce the catheterization reports from Gainesville, and they showed no complication whatever. More important, the records proved conclusively that the incidents Dr. Elliot described did not and could not have happened. Dr. Shahawy undertook to provide the records, and the hearing adjourned. 349] In closed session, the committee voted to refer "Dr. Shahawy's new material, plus any other material related to the application and not yet considered," back to the lower committees.

Dr. Shahawy submitted the catheterization reports, which conclusively refuted all the allegations about his performance at the University of Florida. The Cath Lab Standards Committee also

received (from Mr. Harrison) seven new depositions.

The deposition testimony the Cath Lab Standards Committee purported to rely on was all demonstrably contrary to the cath lab records. The alleged incidents at Shands Teaching Hospital could not have happened and did not happen.

The new "Supplemental Report" [R 482 J191] ignored the catheterization reports. It ignored the superlative testimony from Dr. Shahawy's superiors and other professors of cardiology at the University of Florida. The Executive Committee reconvened and voted again to deny Dr. Shahawy's application.

Dr. Shahawy appealed to the Board, and then filed this suit. In response, the Board resolved to extend financial support to everyone involved in the credentialing process. The resolution included "members of the Board and the medical staff, administrative personnel, attorneys representing the hospital, other employees and agents of the hospital, and witnesses and persons furnishing information." The indemnity extended to "liability for attorney's fees and/or judgments," and was expressly made retroactive. The only hint of a limitation was the phrase, "to the limits of Florida law."

When the Board heard Dr. Shahawy's appeal, a respiratory therapist (who had never testified or even given any information to any medical staff committee) described a particular Swan-Ganz

catheterization procedure Dr. Shahawy had recently performed. She claimed the procedure should have taken only twenty minutes but took one hour. She said that she told Dr. Shahawy that his arm hair had touched the catheter, but he ignored her. She said she had "heard" the patient "may have had phlebitis" as a result. On cross-examination, the therapist identified the patient -- Dr. John O'Neil.

Having no notice that Sclafani would testify or that the December 28 procedure would be questioned, Dr. Shahawy called his first witness -- Dr. John O'Neil. He testified that he was awake and fully aware during the procedure, and had taken no medication. And he directly contradicted Sclafani's story:

Q. Did the procedure that was performed on you, Dr. O'Neil, take an hour to perform?

A. Oh, no. I'd say about fifteen or twenty minutes at the most.

Q. And did you, sir, suffer any infection as a result of Dr. Shahawy's —

A. No. I did knock the scab off it several times since I have been home, but there is no infection.

Q. Did you, sir, suffer phlebitis from this procedure?

A. Phlebitis?

Q. Yes, sir.

A. I'm afraid I wouldn't recognize the symptoms if I — if I did suffer it.

Dr. O'Neil rolled up his sleeve and showed the Board members his incision. The Board denied Dr. Shahawy's application.

In March, 1983, Defendant Harrison began a process to terminate Dr. Shahawy's staff membership, citing complaints that Dr. Shahawy's catheterization application was interfering with "the orderly process of the hospital."

In June, 1983, the Medical Section Privileges Committee met and voted as follows:

> Due to the adverse impact on staff functions by Dr. Shahawy manifested by:
>
> 1. Intimidation of staff members by threat of lawsuit, rendering it difficult to obtain members to serve on committees,
>
> 2. Harassment of medical section officers and members,
>
> 3. Disruption of medical section meetings by persistent false accusation,

> We recommend that he not be reappointed to the staff.

On September 8, Dr. Shahawy wrote to Defendant French, the Board Chairman:

> I also advised you that this report was not processed according to the medical staff By-Laws and that I was *not given due process before the medical staff* regarding such allegations, i.e., "disruptive behavior at committee meetings."

On September 16, Defendant Floyd refused Dr. Shahawy's request for a list of witnesses who would be called against him:

> [B]ecause of counsel's concern that you may attempt to contact or harass those individuals prior to the hearing, counsel has asked me to have your lawyer contact their office with respect to the provision of those names.

At that time, Dr. Shahawy did not have counsel.

The Board hearing proceeded on October 24-26, 1983. The doctors talked about supposed extraneous "disruptive behavior." Dr. Shahawy was dismissed because Defendants deemed him "disruptive." And Defendants deemed him "disruptive" because he sued them.

One doctor complained that "general knowledge that staff officers in credentialing and individuals who are responsible in credentialing matters may be defendants in litigation" had an "intimidating effect" on the meetings. Another complained that he had "an uneasy feeling" because of comments by Dr. Shahawy that "these sorts of matters will be handled elsewhere."

Another complained:

> Being named in a lawsuit and being charged as a conspirator in trying to violate his civil rights, and as racketeering and so on, I would certainly interpret it as harassment or perceive as harassment.
>
> [*Id.* II. p. 151]

A former chief of staff complained that "Dr. Shahawy has been so divisive that members of the staff began not to trust one another." He also complained that Dr. Shahawy had committee members served with subpoenas:

> This had made them so mad that several individuals refused, they said, to be pushed around in this manner, and did not want to even consider Dr. Shahawy's application. I asked them at that time to forego any kind of impression that this obvious repressive move might create ....

After the hearing, the Board voted to dismiss Dr. Shahawy. The Board said that "Dr. Shahawy's behavior in the hospital has been disruptive to the orderly operation of the hospital and its essential medical staff activities."

Dr. Shahawy added the termination of his staff membership to his complaint. The district court entered summary judgment for the Defendants on the antitrust claims, but the Eleventh Circuit again reversed. *Shahawy v. Harrison,* 875 F.2d 1529 (11th Cir. 1989).

Dr. Shahawy was then elected to the Hospital Board, where he served from 1990 to 1992. In 1991, unable personally to continue litigation that kept being dismissed by the district court but reinstated by the Court of Appeals, and unwilling to see the public body of which he was then a member continue to spend public funds, Dr. Shahawy relented and acquiesced in the arbitration agreement. A mediator retained the services of three former federal judges to serve as Arbitrators.

After the hearing, at which all of the facts set forth above were presented, together with the unrefuted expert economic testimony of the Plaintiffs' expert, the three retired federal judges selected as arbitrators entered an award, which stated in its entirety:

> After carefully considering all of the evidence adduced at the hearing, and of all the post-

> hearing briefs submitted by counsel, the panel has concluded that the plaintiffs have failed to prove any violation of the federal or state antitrust laws, and therefore enters its award in favor of all of the defendants.

Dr. Shahawy petitioned the district court to vacate the award. The district court denied that petition. Dr. Shahawy appealed to the Eleventh Circuit, which affirmed without opinion.

Basis for Federal Jurisdiction in Court Below

The district court had jurisdiction pursuant to 28 U.S.C. 1331, 15 U.S.C. § 4, and 9 U.S.C. § 10.

ARGUMENT

The Defendants capped off a decade-long campaign to destroy Dr. Shahawy's career in retaliation for his suing them for antitrust violations by forcing him into an agreement which purported to have his claims arbitrated by three retired federal judges, without even the right of review provided for in the Arbitration Code. Those retired judges then excluded evidence which was devastating to the defendants' pretextual grounds for their unlawful actions, with no possible legal basis for the exclusion and for the transparent reason of keeping the devastating information from the public eye. The victims have been not only Dr. Shahawy, and the community for which he has sought to provide high quality medical care. Judicial process as itself been a victim.

The Arbitrators knowingly and unlawfully excluded a singularly critical piece of evidence — the "TECS Report." Manifestly afraid of its perceived damaging effects *outside the Arbitration hearing*, they refused even to allow Plaintiffs' counsel to keep a copy of the document or to share the document or its contents with the Plaintiff himself. The Arbitrators refused to consider this evidence and refused to allow Plaintiff himself to see a copy.

The TECS Report was prepared by an outside consultant (*not* a physician) "for the purpose of assessing the current status of the Cardiovascular Program with special

emphasis on the Heart Catheterization Laboratory." The Report began by noting that, "concerns were expressed regarding the behavior interface and interaction of the physicians with the hospital staff. . . . "

The TECS concluded starkly that the doctors in the cath lab were doing excessive numbers of unnecessary invasive procedures. "The two cath. labs are extremely busy, and *when compared with national normative data, are over-utilized.*"

The TECS Report found that the Myers and Natarajan Groups were emotionally abusing the staff:

> These pressures and frustrations have been experienced for a number of years, and not only did the cath. lab staff feel overworked and under-appreciated, but felt that they were being emotionally abused by the physicians. Pressure and stress have been building for quite some time, but the cath. lab staff felt that no one was paying attention to their complaints and that their issues and concerns were being ignored. This resulted in a threatened "walkout" last year. There is a history of an unusually high turnover of personnel in the cath. lab which is attributed to the time demands, working

conditions, and physician behavior. . . .

* * *

The physicians are perceived as greedy, selfish, immature, and difficult to work with. They are reported as being arrogant and verbally abusive to staff. The rivalry and in-fighting among the physicians [are] creating tension and stress and they are seen as taking out their anger and frustrations on the lab staff. These negative behaviors are reported as often being exhibited in front of patients and families.

The staff report that the physicians behave and act differently with the male staff members than with the female staff. There are fewer complaints about the physician's [sic] behavior and interaction from the male staff members.

One of the major concerns of the staff regarding the physicians is that it is often very difficult to reach the doctors. The physicians don't respond to pages and calls, and this non-responsiveness often compromises the patient and patient-care. Another major concern is that some of the physicians (primarily Dr. Myers) don't

> write and/or sign orders, but give them verbally to the nursing staff.
>
> The staff feels that the high competition between the physician groups for space and time in the cath. lab has caused the physicians to use manipulation to get patients into the lab. *Accusations of lying, calling false emergencies, and catheterizing "too many normals" were made.* The physicians are seen as not willing to sit down and talk with each other about the issues, being non-confrontive with each other, and undermining each other by 'talking about each other behind the other['s back.' There is a definite lack of institutional loyalty among the cardiologists, and each is seen as having his own 'business plan' which is often in conflict with the other physicians and the hospital.
>
> [emphasis added]

The Report continued that the doctors were performing unnecessary procedures for financial gain, at the risk of patient care:

> Another major developing issue relates to 'quantity vs. quality.' The staff feel that the invasive cardiologists are

overutilizing the cath. lab for quantity motivations and not paying attention to how this orientation is affecting the quality of patient care and workload of the staff. Some physicians report that they feel that the *mortality statistics are too high* in the cardiovascular program, and that the balloon angioplasty results are below national norms for the procedure. For example, it was reported that there is an 80% positive result for single vessel angioplastys at SMH, while it should be 95%+.

The staff feels that the physicians mistreat and abuse them by belittling them in front of patients and other staff, blaming them for events for which they had no responsibility, raising their voices, and showing very little respect for their competence and capability. Most staff identify Drs. Myers, Crick, King and Hartman as the most difficult to work with.

While the Myers group is criticized most for the abusive [sic] behaviors, the Natarajan group is criticized for creating scheduling problems, non-responsiveness, case delays, and inappropriate 'add-ons.' The staff distrust the information

> given by the physicians and are frustrated in trying to sort out fact from fiction; this issue is felt most strongly in relation to Dr. Hartman. Dr. King is perceived as being a sexist and is accused of making very sexist remarks and treating the males much differently than he treats the females.
>
> [emphasis added]

The Report also noted that the hospital "administration is not trusted" because it "is seen as unwilling to support staff and confront physicians because *they are high income generators.*" [emphasis added]

The Arbitrators were guilty of misconduct in refusing to hear this evidence, which clearly was "pertinent and material to the controversy" as required by Section 10(a).

As the Arbitrators expressly acknowledged, the Florida peer review statutes do not apply in this proceeding under federal law. *Feminist Women's Health Center, Inc. v. Mohammad,* 586 F.2d 530, 544 n.9 (5th Cir. 1978) (Florida Statutes § 768.40, which bars use of medical review committee records and reports as evidence in civil actions "cannot, of course, bar the use of such evidence in the trial of a federal cause of action"), *cert. denied,* 444 U.S. 924 (1979).

As the Arbitrators also acknowledged, the TECS report was not in any way "peer review." The statutes purport to shield only investigations, proceedings and records of a committee/board "*in any civil or administrative action* against any provider of professional health services *arising out of the matters which are the subject of evaluation and review*" by such committee/board (emphasis added). The statute protects *only* "documents considered by the committee or board during the peer review or credentialing process." *Parrado v. State*, 599 So. 2d 111, 114 (Fla. 1992); *see also Parkway General Hospital, Inc. v. Allinson*, 453 So.2d 123, 126 (Fla. 3d DCA 1984) ("the shield of confidentiality protects only those words spoken within the four walls of the committee meeting itself and the records made as a direct result thereof").

The entire case hinged upon the Defendants' motivation in excluding Dr. Shahawy. For ten years of litigation Defendants have hidden their anticompetitive acts behind a gauzy cloak of sanctimonious claims that they were selflessly dedicated to providing quality health care. The TECS Report gives the lie to the Defendants' sanctimony.

Petitioners respectfully and earnestly submit that the Arbitrators' baseless exclusion of this pivotal and dispositive evidence leaves the award with no semblance of credibility or authority. As this Court stated regarding the related requirement of arbitrator impartiality:

> [A]ny tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias. We cannot believe that it was the purpose of Congress to authorize litigants to submit their cases and controversies to arbitration boards that might reasonable be thought biased against one litigant and favorable to another.

Commonwealth Coating Corp. Continental Casualty Co., 393 U.S. 145, 150 (1968).

This Court expressly rejected the Elventh Circuit's "specially lenient 'abuse of discretion' standard (even as to questions of law) when reviewing district court decisions that confirm . . . arbitration awards," in *First Options of Chicago, Inc. v. Kaplan*, __ U.S. __, 63 USLW 4459 [Case No. 94-560] (1995). The Court held that the deference due to arbitrators "does not mean that appellate courts should give extra leeway to district courts that uphold arbitrators."

The Eleventh Circuit here plainly gave special deference to the district court decision refusing to vacate the arbitration award. But none of them can ignore the indisputable fact that the Arbitrators baselessly excluded critical evidence. Plainly, "the arbitrators were guilty of misconduct . . .in refusing to hear evidence pertinent and material to the controversy." 9 U.S.C. §10(3). No

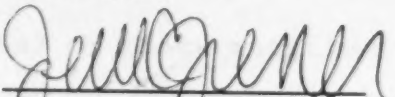
deference should be given to such misconduct.

CONCLUSION

Petitioners respectfully requests the Court to issue a Writ of Certiorari to review and quash the Eleventh Circuit's affirmance of the district court's denial of their petition to vacate the arbitrators' award.

Respectfully submitted,

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BEFORE A PRIVATE ARBITRATION PANEL

MAHFOUZ EL SHAHAWY, M.D., etc., et al.,

Plaintiffs,

vs.

WILLIAM T. HARRISON, JR., et al.,

Defendants.

_____/

ARBITRATION AWARD

After careful consideration of all of the evidence adduced at the hearing, and of all the post-hearing briefs submitted by counsel, the panel has concluded that the plaintiffs have failed to prove any violation of the federal or state antitrust laws, and therefore enters its award in favor of all of the defendants.

Done at New York, this 16th day of April, 1992.

/s/
Frank H. McFadden
/s/
Frederick B. Lacey
/s/
Thomas A. Masterson

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CASE NO.: 82-1207 CIV-T-WC

MAHFOUZ EL SHAHAWY, M.D., etc., et al.,

Plaintiffs,

vs.

WILLIAM T. HARRISON, JR., et al.,

Defendants.
_____/

ORDER

Before the Court is the plaintiffs' motion to vacate arbitration award (D-482) and defendants' motion for enforcement of settlement agreement (D-483).[1]

The facts and procedural history emanating from this case are extensive.

1/ Plaintiffs' petition has been filed in violation of Middle District of Florida Local Rule 3.01(c) to the extent that the petition exceeds twenty pages in length. The Court directs plaintiffs' counsel to refrain from making non-relevant, personal and superfluous comments about opposing counsel or parties in pleadings submitted to the Court.

The Court need not repeat them here because they are reported at 778 F.2d 636 (11th Cir. 1985), modified, 790 F.2d 75 and 876 F.2d 1529 (11th Cir. 1989). The plaintiffs seek vacation of the arbitration award pursuant to 9 U.S.C. § 10, and progeny case law. Section 10 provides:

> (a) In any of the following cases the United States Court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration
>
> (1) Where the award was procured by corruption, fraud, or undue means.
>
> (2) Where there was evident partiality or corruption in the arbitrators, or either of them.
>
> (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

> (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter was not made.

The Plaintiffs set forth six arguments in support of their petition.

As a threshold matter, it should be noted that the burden to establish these claims rests squarely upon the plaintiffs. Furthermore, judicial review of arbitration awards is very limited. Brown v. Rauscher Pierce Refsnes, Inc., 994 F.2d 775, 778 (11th Cir. 1993). The Eleventh Circuit has set forth the following framework for analyzing an arbitration award:

> The FAA (Federal Arbitration Act) presumes that awards will be confirmed, 9 U.S.C. § 9, and enumerates only four statutory grounds for vacatur, we have recognized two additional non-statutory bases upon which an arbitration award may be vacated. First, an arbitration award may be vacated if it is arbitrary and capricious. Second,

> an arbitration award may be set aside if contrary to public policy.

Id. at 778-79 (citations omitted).[2]

The plaintiffs first argue that "the [a]rbitrators knowingly and unlawfully excluded a singularly critical piece of evidence -- the "Training, Education and Consulting Services Report" ("TECS Report").[3] The TECS Report was prepared

---

2/ The plaintiffs do not argue that the arbitrators' award was arbitrary and capricious or contrary to public policy. Accordingly, the Court will limit its analysis to the statutory grounds for vacatur as set forth in 9 U.S.C. § 10.

3/ For reasons unknown to this Court, the argument and subsequent panel ruling were not reported as part of the transcript testimony.

Paragraph 7.1 of the parties' Arbitration Agreement provides:

> In making decisions about discovery and information exchange procedures, admission of evidence, and all other matters, the Arbitrators shall balance the need to consider the evidence against the goal of this Agreement to ensure that the dispute between the Plaintiffs and Defendant [sic] is resolved in a timely and cost-

(continued...)

by an outside consultant "for the purpose of assessing the current status of the Cardiovascular Program with special emphasis on the Heart Catheterization Laboratory." In their current motion, the plaintiffs spend a significant amount of time relaying the contents of the TECS Report, while advancing few substantive arguments on its alleged wrongful exclusion. The arbitration panel apparently excluded the TECS Report based upon the following grounds: (1) hearsay; (2) irrelevance; and (3) Evidence Rule 403.[4]

---

[3] (...continued)

> effective way. So long as the Arbitrators allow (1) the written oral submissions provided for in this Agreement to be made and (2) the time set out in this Agreement for preparation and hearing, no party shall challenge the Award on the ground that the Arbitrators were guilty of misconduct by failing to consider pertinent or material evidence or by failing to postpone a hearing.

[4] At the arbitration hearing, the plaintiffs also contended that the TECS Report was admissible because it was not within the purview of Florida Statute § 768.40. Section 768.40 shields investigations, proceedings and records of a committee/board "in any civil or adminis- (continued...)

Federal Courts, in dealing with an arbitrator's refusal to hear evidence, have held that "[o]nly the most egregious error which resulted in adversely affecting the rights of a party would justify the application of the rule (9 U.S.C. § 10(c)) and require vacatur of an award." Hunt v. Mobil Oil Corp., 654 F.Supp. 1487, 1512 (S.D.N.Y. 1987). Furthermore, absent exceptional circumstances, a reviewing court may not overturn an arbitrator's

---

4/(...continued)
trative action against any provider of professional health services arising out of the matters which are the subject of evaluation and review" by such committee/board. The defendants argued, inter alia, that § 768.40 precluded admissibility of the TECS Report because it fell squarely within the language of the statute. The arbitrators found, however, that § 768.40 could not bar the admissibility of such evidence in the trial of a federal cause of action. The Court need not resolve this issue because the Court finds that the arbitration panel properly excluded the TECS Report on separate grounds.

determination of the relevancy or persuasiveness of evidence submitted. Hoteles Condado Beach, Is. Concha and Convention Center v. Union De Tronquistas Local 901, 763 F.2d 34, 39-40 (1st Cir. 1985).

The Court finds that the arbitrators' refusal to receive the TECS Report was not an "egregious error which resulted in adversely affecting the rights" of the plaintiffs. The TECS Report was compiled in 1990, years after this case was filed. There is no indication that the scenarios depicted in the TECS Report took place during the period of time relevant to this case. Assuming arguendo that the TECS Report does accurately depict the cardiovascular program at the times relevant to this case, the plaintiffs had ample opportunity to offer proof of their theory by

providing direct evidence. The plaintiffs failure to do so does not meet the standard contemplated in the case law regarding vacatur of arbitrator awards. In sum, the Court finds that the plaintiffs have failed to meet their burden to establish that the TECS Report was improperly excluded.

The plaintiffs next argue that the arbitrators improperly denied discovery of the "Horty, Springer & Mattern documents" ("Horty documents"). Horty, Springer and Mattern, a law firm, represented the Hospital during the period of time when Dr. Shahawy's medical privileges were terminated.[5] After a hearing and in camera review of the documents, the chairman of

---

[5] The Hospital Board voluntarily produced documents produced between it and the law firm. It objected, however, to the production of those documents which contained the mental impressions of counsel.

the arbitration panel denied the plaintiffs' motion to compel production based upon the attorney-client privilege. At the arbitration hearing the plaintiffs made a similar request, which was again denied by the chairman.[6]

The Court finds that, under the preceding authority, the plaintiffs have failed to meet their burden to show that the arbitration panel improperly denied discovery of the Horty documents.

Plaintiff contends that the failure to enter an award within the allotted time [under the arbitration agreement] requires

---

[6] The designated United States Magistrate Judge considered and denied the same request by Orders of August 4, 1986, and August 25, 1986.

vacatur of the award;[7] (2) there was evident partiality in the arbitrators; (3) there was a repudiation of the agreement by the defendants; and (4) the award was procured by undue means.

The plaintiffs have failed to cite legal authority to support these arguments. Notwithstanding the plaintiffs' failure in that regard, the Court again finds that the plaintiffs have failed to meet their burden.

Accordingly, it is ORDERED:

(1) That the plaintiffs' motion to vacate arbitration award (D-482) is DENIED.

(2) That the defendants' motion for enforcement of settlement agreement (D-483) is GRANTED and Endispute, Inc. is ORDERED

7/ The case cited by plaintiffs, Ierna v. Arthur Murray Int'l, Inc., 833 F.2d 1472 (11th Cir. 1987), does not stand for the proposition asserted.

to deliver the original mutual releases executed by the parties and the original stipulation for dismissal with prejudice executed by counsel for the parties.

(3) That this case is DISMISSED.

DONE AND ORDERED at Tampa, Florida, this 8th day of Sept., 1993.

/s/
ELIZABETH A. KOVACHEVICH
UNITED STATES DISTRICT JUDGE

Copies to:
Counsel of Record

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Case No. 93-3367

D.C. Docket No. 82-1207-CIV-T-15

MAHFOUZ EL SHAHAWY, M.D., M.S., F.A.C.C., Individually, and MAHFOUZ EL SHAHAWY, M.D., P.A., a Florida Professional Assoc.,

Plaintiff-Appellant,

versus

WILLIAM T. HARRISON, JR., Individually, F. EDWARDS RUSHTON, M.D., Individually, JOHN N. CARLSON, M.D., Individually, WILLIAM L. PAGE, M.D., Individually, RICHARD J. SARKIS, M.D., Individually, Et Al.

Defendants/Appellees,

Appeal from the United States District Court for the Middle District of Florida

(March 20, 1995)

Before COX, and BLACK, Circuit Judges, and FAY, Senior Circuit Judge.

PER CURIAM: AFFIRMED. See 11th Cir. R. 36-1.

"Costs taxed against plaintiff-appellant."

Judgment Entered: March 20, 1995
For the Court: Miguel J. Cortez, Clerk
By: /s/ Karleen McNabb
Deputy Clerk

ISSUED AS MANDATE: APR 28 1995

FILED
JUL 17 1995
CLERK

(2)

No. 94-2082

In The

Supreme Court of the United States

October Term, 1995

MAHFOUZ EL SHAHAWY, M.D. and MAHFOUZ EL SHAHAWY, M.D., P.A.,

Petitioners,

v.

WILLIAM T. HARRISON, JR., et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in affirming the district court's ruling that the arbitration panel was not guilty of misconduct by its refusal to admit in evidence a proffered document.*

---

*The statement of Questions Presented For Review in the petition is misleading by asserting baldly (a) that the arbitrators "indisputably" were guilty of misconduct, and (b) that the evidence in question was "pertinent and material" to the controversy. This brief will show that the document in question (the so-called "TECS Report") was not pertinent or material within the meaning of the arbitration statute and that the arbitrators clearly were not guilty of misconduct.

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No. 94-2082

In The

Supreme Court of the United States

October Term, 1995

MAHFOUZ EL SHAHAWY, M.D. and MAHFOUZ EL SHAHAWY, M.D., P.A.,

Petitioners,

v.

WILLIAM T. HARRISON, JR., et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Kespondents respectfully pray that the Court deny the petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit.

STATEMENT OF CASE

Petitioner, Mahfouz El Shahawy, was a member of the medical staff of Sarasota Memorial Hospital, owned and operated by defendant Sarasota County Public Hospital Board. Petition, p.1.

In 1982 the Hospital Board denied Shahawy's application for privileges in the cardiac catheterization laboratory. Shahawy filed suit in the federal district court alleging antitrust, civil rights and RICO claims, plus pendent state law claims. The district court dismissed that complaint. The Eleventh Circuit affirmed in part and reversed as to the antitrust counts. *Shahawy v. Harrison*, 778 F.2d 636 (11th Cir. 1985), *modified*, 790 F.2d 75 (11th Cir. 1986).

During pendency of that first appeal, the Hospital Board declined to renew Shahawy's medical staff membership. Following remand, the complaint was amended to include that non-renewal, alleging antitrust, civil rights, RICO and various state claims. In addition to the Hospital Board, the amended complaint named 17 defendants, including four administrators, two attorneys and 11 physicians. Again, the district court ruled in favor of the defendants. Again, the Eleventh Circuit affirmed except for the antitrust claims. *Shahawy v. Harrison*, 875 F.2d 1529 (11th Cir. 1989). The opinion noted that substantial competent evidence supported the decision to terminate Shahawy's medical staff membership, and that Shahawy had received more than minimum procedural due process. *Id.*, 875 F.2d at 1533-1534. Thus, the two Eleventh Circuit opinions do not support Shahawy's assertions of a vendetta.

In 1991, the parties agreed to mediation of the remaining antitrust claims. R1-473,474. A settlement resulted which included an agreement to "final, binding, and enforceable" arbitration of the antitrust claims. R1-483 Ex. A,B. The three member arbitration panel was selected from a list of 22 retired federal judges. *Id.* After a

12-day evidentiary hearing, hundreds of documentary exhibits and extensive post-hearing memoranda, the arbitration panel ruled in favor of all defendants, stating simply that "the plaintiffs have failed to prove any violation of federal or state antitrust laws." RJ-483 Ex. F.

The district court denied Shahawy's petition to vacate the arbitration award.[1] The Eleventh Circuit affirmed the district court's order without opinion. 51 F.3d 1049 (11th Cir. 1995).

The order of the district court included a ruling that exclusion of the TECS Report was not improper; the parties had waived the right to challenge the award on the ground of an erroneous evidentiary ruling, and the exclusion was not "egregious error." Order, App. pp. 3-5. The petition challenges only the affirmance of exclusion of the TECS Report. Petition, pp. 16-24.

SUMMARY OF ARGUMENT

The sole ground for this petition is that the arbitrators improperly excluded the TECS Report and that the district court and the court of appeals improperly refused to vacate the award for that reason.

That claim is untenable because Shahawy expressly waived any right to challenge the award on the ground that the arbitrators were guilty of misconduct by failing

[1] The order of the district court is provided as an appendix to this brief. It is cited as "Order, App. p. ___." The per curium order of the court of appeals is also included as an appendix.

to consider pertinent or material evidence. Moreover, the TECS Report was not "pertinent and material to the controversy" within the meaning of the federal arbitration statute, so that exclusion of this evidence could not be misconduct.

This petition falls far outside the criteria for certiorari petitions set forth in Rule 10. There is no conflict with decisions of other courts. The per curiam opinion of the court of appeals does not present any important federal question. It does not establish any precedent. It simply affects the medical staff of a single physician. The basic issue is correctness or incorrectness of an evidentiary ruling by arbitrators. There is no national significance worthy of this Court's attention.

Subsequent to the judgment of the Eleventh Circuit, this Court announced *First Options of Chicago, Inc. v. Kaplan*, ___ U.S. ___, 115 S.Ct. 1920 (1995), concerning courts of appeals' standard of review of district court decisions confirming arbitration awards. That opinion does not affect this petition in view of the overwhelming correctness of the opinion of the district court in this case.

ARGUMENT

REASONS FOR DENYING WRIT

I. Exclusion Of The TECS Report Was Not Misconduct On The Part Of The Arbitrators.

The petition asks this Court to monitor the arbitrators' exercise of discretion within their authority. There

are no special circumstances which might call for granting this petition.

The sole claim in the petition is that "[t]he Arbitrators knowingly and unlawfully excluded a singularly critical piece of evidence – the 'TECS Report,' " contrary to 9 U.S.C.A. §10(a) (3). Petition, p. 16. The statute provides:

> (a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration
>
> * * *
>
> (3) Where the arbitrators were guilty of misconduct . . . in refusing to hear evidence pertinent and material to the controversy;

The TECS Report (Training, Education and Consulting Services Report) is described in the Order as a document prepared by an outside consultant for the purpose of assessing the current (1990) status of the Cardiovascular Program with special emphasis on the cardiac catheterization laboratory. The report was compiled by a behavioral psychologist, not a physician, based on his interviews with certain cardiac catheterization laboratory personnel. R1-482. Thus it was basically hearsay. The petition contends that the TECS Report, prepared in 1990, reveals the motivation of the Hospital Board in ruling adversely to Shahawy years before in 1983. Petition, p. 22.

The district court upheld exclusion by the arbitrators on the following two grounds.

A. Shahawy expressly waived any objection based on exclusion of evidence.

In the Arbitration Agreement, Shahawy agreed:

> In making decisions about discovery and information exchange procedures, admission of evidence, and all other matters, the Arbitrators shall balance the need to consider the evidence against the goal of this Agreement to ensure that the dispute Plaintiffs and Defendant (sic) is resolved in a timely and cost-effective way. So long as the Arbitrators allow (1) the written oral submissions provided for in this Agreement to be made and (2) the time set out in this Agreement for preparation and hearing, no Party shall challenge the Award on the ground that the arbitrators were guilty of misconduct by failing to consider pertinent or material evidence or by failing to postpone the hearing.

R1-483 Ex. B; Order, p. App. 3.

The parties are free to set such ground rules. *United Paperworkers Int. Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 39, 108 S.Ct. 364, 9 L.Ed. 2d 286 (1987). Shahawy did not raise any question as to the conditions of the waiver.

B. Exclusion Of The TECS Report Was Not "Egregious Error."

Federal courts applying section 10(a) (3) generally do not focus on literal tests of "pertinent" or "material."[2]

---

[2] The TECS Report was conceivably neither "pertinent" nor "material" under dictionary definitions of those terms. The

Instead, they customarily look at whether exclusion of "relevant" evidence "so affects the rights of a party that it may be said that he was deprived of a fair hearing." *Hoteles Condado Beach, La Concha & Convention Center v. Union de Tronquistas Local 901*, 763 F.2d 34, 40 (1st Cir. 1985), quoting *Newark Stereotypers' Union No. 18 v. Newark Morning Ledger Co.*, 397 F.2d 594, 599 (3d Cir.), *cert. denied*, 393 U.S. 954, 89 S.Ct. 378, 21 L.Ed. 2d 365 (1968). Here the district court followed that trend, citing *Hunt v. Mobil Oil Corp.*, 654 F.Supp. 1487, 1512 (S.D.N.Y. 1987), for the principle that vacatur is justified only by finding a "most egregious error" on the part of the arbitrator. Order, App. p. 4. In this connection, the district court held:

> The Court finds that the arbitrators' refusal to receive the TECS Report was not an "egregious error which resulted in adversely affecting the rights" of the plaintiffs. The TECS Report was compiled in 1990, years after this case was filed. There is no indication that the scenarios depicted in the TECS Report took place during the period of time relevant to this case. Assuming *arguendo* that the TECS Report does accurately depict the cardiovascular program at the times relevant to this case, the plaintiffs had ample opportunity to offer proof of their theory by providing direct evidence. The plaintiffs failure to do so does not create the exceptional circumstances contemplated in the case law

---

panel arguably was required to hold there was no antitrust violation by virtue of the doctrine of state action immunity delineated in City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 111 S.Ct. 1344, 113 L.Ed 2d 382 (1991). In that circumstance, the Report would have been completely irrelevant.

> vacating arbitrator awards. In sum, the Court finds that the plaintiffs have failed to meet their burden to establish that the TECS Report was improperly excluded.

Order, App. p. 5. The court of appeals did not need to write an opinion to agree with that sound reasoning.

Moreover, the district court's order shows that the arbitration panel heard extensive argument as to reception of the TECS Report. Order, App. p. 4 n.4. This further demonstrates that Shahawy received the "fair hearing" contemplated by *Hoteles Condado Beach. See Cordis Corp. v. C.R. Bard, Inc.*, 1993 WL 723844 3 (S.D. Tex. March 11, 1993) ("Because the arbitrator is judge of the admissibility and relevance of evidence submitted in an arbitration proceeding, and because the arbitrator in this proceeding entertained argument on the relevancy of evidence derived from test performed on used balloons before deciding to exclude it as irrelevant, the arbitrator's decision to exclude this evidence did not prevent Cordis from receiving a fundamentally fair hearing.")

II. This Case Does Not Have Broad National Significance.

Despite agreeing to binding arbitration, Shahawy is unhappy with the result. Two federal courts have upheld that result. Now Shahawy relies on a single evidentiary ruling by the arbitrators to ask this Court to rexamine the enormous arbitration record.

The weakness of the petition is emphasized by the fact that all parties to the arbitration expressly waived any right to challenge the award on the ground that the

arbitrators had improperly excluded pertinent or material evidence.

This case does not even approach the general criteria set forth in Rule 10 of the Supreme Court Rules. There is no conflict with decisions of other courts interpreting 9 U.S.C.A. §10(a) (3). The materiality of the TECS Report – discussing events occurring years after the last amendment of the complaint – is not such an important federal question as to deserve the attention of this Court.

This case involves the qualifications of one physician to be a member of the medical staff of a major hospital. It is a "peer review" controversy depending solely on its own particular facts. It will not establish any precedent, not even for subsequent peer review proceedings at this same hospital. National significance – even local significance – is completely lacking.

III. Evaluation Of This Petition Is Not Affected By This Court's Recent Opinion Concerning Standard Of Review.

The judgment of the Eleventh Circuit in this case was entered on March 20, 1995. On May 22, 1995 this Court decided *First Options of Chicago Inc. v. Kaplan*, ___ U.S. ___, 115 S.Ct. 1920 (1995). The *First Options* opinion will undoubtedly provide guidance to the Eleventh Circuit in the future, but it does not affect this petition.

In *First Options*, the Court was reviewing a decision of the Third Circuit concerning arbitrability of a dispute, not exclusion of evidence by an arbitrator. In discussing standard of review of district court arbitration decisions,

the Court criticized *Robbins v. Day*, 954 F.2d 679, 681-682 (11th Cir. 1992), which explained reasons for applying a specially lenient abuse of discretion standard when reviewing district court decisions that confirm arbitration awards. *Id.*, 115 S.Ct. at 1926.

The per curiam judgment of the Eleventh Circuit does not state that it was applying a lenient standard of review.

The Eleventh Circuit affirmance cites 11th Cir. R. 36-1. App. p. 8. That rule provides in pertinent part:

> When the court determines that any of the following circumstances exist:
>
> (a) judgment of the district court is based on findings of fact that are not clearly erroneous;
>
> * * *
>
> (e) judgment has been entered without a reversible error of law;
>
> and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

This is not a case where the court of appeals wrote a long opinion holding that there were valid arguments both ways but that its "lenient standard" impelled it to uphold the district court. To the contrary, the district court's opinion is so overwhelmingly correct that the court of appeals found no need to write any opinion, and so affirmed per curiam.

CONCLUSION

For the foregoing reasons, the writ of certiorari to the United States Court of Appeals for the Eleventh Circuit should be denied.

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

MAHFOUZ EL SHAHAWY, M.D., etc., et al.,

Plaintiffs,

v.

Case No. 82-1207-CIV-T-WC

WILLIAM T. HARRISON, JR., et al.,

Defendants.

ORDER

Before the Court is the plaintiffs' motion to vacate arbitration award, (D-482) and defendants' motion for enforcement of settlement agreement (D-483).[1]

The facts and procedural history emanating from this case are extensive. The Court need not repeat them here because they are reported at 778 F.2d 636 (11th Cir. 1985), *modified*, 790 F.2d 75 and 875 F.2d 1529 (11th Cir. 1989). The plaintiffs seek vacation of the arbitration award pursuant to 9 U.S.C. § 10, and progeny case law. Section 10 provides:

---

[1] Plaintiffs' petition has been filed in violation of Middle District of Florida Local Rule 3.01(c) to the extent that the petition exceeds twenty pages in length. The Court directs plaintiffs' counsel to refrain from making non-relevant, personal and superfluous comments about opposing counsel or parties in pleadings submitted to the Court.

> (a) In any of the following cases the United States Court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration –
>
> (1) Where the award was procured by corruption, fraud, or undue means.
>
> (2) Where there was evident partiality or corruption in the arbitrators, or either of them.
>
> (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
>
> (4) Where the arbitrators exceeded their powers or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

The plaintiffs set forth six arguments in support of their petition.

As a threshold matter, it should be noted that the burden to establish these claims rests squarely upon the plaintiffs. Furthermore, judicial review of arbitration awards is very limited. *Brown v. Rauscher Pierce Refsnes, Inc.*, 994 F.2d 775, 778 (11th Cir. 1993). The Eleventh Circuit has set forth the following framework for analyzing an arbitration award:

> The FAA (Federal Arbitration Act) presumes that awards will be confirmed, 9 U.S.C. § 9, and enumerates only four narrow bases for vacatur. . . . In addition to these four statutory grounds for vacatur, we have recognized two

> additional non-statutory bases upon which an arbitration award may be vacated. First, an arbitration award may be vacated if it is arbitrary and capricious. Second, an arbitration award may be set aside if contrary to public policy.

Id. at 778-79 (citations omitted).[2]

The plaintiffs first argue that "the [a]rbitrators knowingly and unlawfully excluded a singularly critical piece of evidence – the "Training, Education and Consulting Services Report" ("TECS Report").[3] The TECS Report was prepared by an outside consultant "for the purpose of

---

[2] The plaintiffs do not argue that the arbitrators' award was arbitrary and capricious or contrary to public policy. Accordingly, the Court will limit its analysis to the statutory grounds for vacatur as set forth in 9 U.S.C. § 10.

[3] For reasons unknown to this Court, the argument and subsequent panel ruling were not reported as part of the transcript testimony.

Paragraph 7.1 of the parties' Arbitration Agreement provides:

> In making decisions about discovery and information exchange procedures, admission of evidence, and all other matters, the Arbitrators shall balance the need to consider the evidence against the goal of this Agreement to ensure that the dispute between Plaintiffs and Defendant [sic] is resolved in a timely and cost-effective way. So long as the Arbitrators allow (1) the written oral submissions provided for in this Agreement to be made and (2) the time set out in this Agreement for preparation and hearing, no party shall challenge the Award on the ground that the Arbitrators were guilty of misconduct by failing to consider pertinent or material evidence or by failing to postpone a hearing.

assessing the current status of the Cardiovascular Program with special emphasis on the Heart Catheterization Laboratory." In their current motion, the plaintiffs spend a significant amount of time relaying the contents of the TECS Report, while advancing few substantive arguments on its alleged wrongful exclusion. The arbitration panel apparently excluded the TECS Report based upon the following grounds: (1) hearsay; (2) irrelevance; and (3) Evidence Rule 403.[4]

Federal Courts, in dealing with an arbitrator's refusal to hear evidence, have held that "[o]nly the most egregious error which resulted in adversely affecting the rights of a party would justify the application of the rule (9 U.S.C. § 10(c)) and require vacatur of an award." *Hunt v. Mobil Oil Corp.*, 654 F.Supp 1487, 1512 (S.D.N.Y. 1987). Furthermore, absent exceptional circumstances, a reviewing court may not overturn an arbitrator's determination of the relevancy or persuasiveness of evidence submitted. *Hoteles Condado Beach, La Concha and Convention Center v.*

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[4] At the arbitration hearing, the plaintiffs also contended that the TECS Report was admissible because it was not within the purview of Florida Statute § 768.40. Section 768.40 shields investigations, proceedings and records of a committee/board "in any civil or administrative action against any provider of professional health services arising out of the matters which are the subject of evaluation and review" by such committee/board. The defendants argued, *inter alia*, that 768.40 precluded admissibility of the TECS Report because it fell squarely within the language of the statute. The arbitrators found, however, that § 768.40 could not bar the admissibility of such evidence in the trial of a federal cause of action. The Court need not resolve this issue because the Court finds that the arbitration panel properly excluded the TECS Report on separate grounds.

Union De Tronquistas Local 901, 763 F.2d 34, 39-40 (1st Cir. 1985).

The Court finds that the arbitrators' refusal to receive the TECS Report was not an "egregious error which resulted in adversely affecting the rights" of the plaintiffs. The TECS Report was compiled in 1990, years after this case was filed. There is no indication that the scenarios depicted in the TECS Report took place during the period of time relevant to this case. Assuming *arguendo* that the TECS Report does accurately depict the cardiovascular program at the times relevant to this case, the plaintiffs had ample opportunity to offer proof of their theory by providing direct evidence. The plaintiffs failure to do so does not create the exceptional circumstances contemplated in the case law vacating arbitrator awards. In sum, the Court finds that the plaintiffs have failed to meet their burden to establish that the TECS Report was improperly excluded.

The plaintiffs next argue that the arbitrators improperly denied discovery of the "Horty, Springer & Mattern documents" ("Horty documents"). Horty, Springer & Mattern, a law firm, represented the Hospital during the period of time when Dr. Shahaway's medical privileges were terminated.[5] After a hearing and *in camera* review of the documents, the chairman of the arbitration panel denied the plaintiffs' motion to compel production based upon the attorney-client privilege. At the arbitration

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[5] The Hospital Board voluntarily produced certain documents produced between it and the law firm. It objected, however, to the production of those documents which contained the mental impressions of counsel.

hearing the plaintiffs made a similar request, which was again denied by the chairman.[6]

The Court finds that, under the preceding authority, the plaintiffs have failed to meet their burden to show that the arbitration panel improperly denied discovery of the Horty documents.

The plaintiffs next argue that: (1) the arbitrators' failure to enter an award within the allotted time [under the arbitration agreement] requires vacatur of the award;[7] (2) there was evident partiality in the arbitrators; (3) there was a repudiation of the agreement by the defendants; and (4) the award was procured by undue means.

The plaintiffs have failed to cite legal authority to support these arguments. Notwithstanding the plaintiffs' failure in that regard, the Court again finds that the plaintiffs have failed to meet their burden.

Accordingly, it is ORDERED:

(1) That the plaintiffs' motion to vacate arbitration award (D-482) is DENIED.

(2) That the defendants' motion for enforcement of settlement agreement (D-483) is GRANTED and Endispute, Inc. is ORDERED to deliver the original mutual release executed by the plaintiffs and original

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[6] The designated United States Magistrate Judge considered and denied the same request by Orders of August 4, 1986, and August 25, 1986.

[7] The case cited by plaintiffs, *Ierna v. Arthur Murray Int'l, Inc.*, 833 F.2d 1472 (11th Cir. 1987), does not stand for the proposition asserted.

stipulation for dismissal with prejudice executed by counsel for the parties.

(3) That this case is DISMISSED.

DONE AND ORDERED at Tampa, Florida this 8th day of SEPT., 1993.

/s/ Elizabeth A. Kovachevich
ELIZABETH A. KOVACHEVICH
UNITED STATES
DISTRICT JUDGE

Copies to
Counsel of Record

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 93-3367

D. C. Docket No. 82-1207-CIV-T-15

MAHFOUZ EL SHAHAWY, M.D., M.S., F.A.C.C., Individually and MAHFOUZ EL SHAHAWY, M.D., P.A., a Florida Professional Assoc.,

Plaintiff-Appellant,

versus

WILLIAM T. HARRISON, JR., Individually,
F. EDWARDS RUSHTON, M.D., Individually,
JOHN N. CARLSON, M.D., Individually,
WILLIAM L. PAGE, M.D., Individually,
RICHARD J. SARKIS, M.D., Individually, Et Al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

(March 20, 1995)

Before COX and BLACK, Circuit Judges, and FAY, Senior Circuit Judge.

PER CURIAM: AFFIRMED. See 11th Cir. R. 36-1.

"Costs taxed against plaintiff-appellant."

Judgment Entered: March 20, 1995
For the Court: Miguel J. Cortez, Clerk

By: /s/ Karleen McNabb
Deputy Clerk

ISSUED AS MANDATE: APR 28 1995